United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4176

UNITED STATES COURT OF APPEALS

FOR THE SECOND DISTRICT

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KIMI SALES, LTD.,

Petitioner,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

----------x

Index #76-4176

B

P/S

PETITIONER's BRIEF

FRANK R. McGLYNN, ESQ.,
Attorney for the Petitioner
Office and P.O. Address
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Woodside, Queens, N.Y. 11377
212 / 446-1313

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INDEX

(Appendix and Index of Prior Proceedings Separately Annexed to Brief, Exhibits A to L.)

TABLE OF CASES

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JURISDICTIONAL STATEMENT

OPINION's BELOW

1) In affirming the decision and order of Administrative Judge Morton D. Friedman, the National Labor Relations Review Board virtually adopted the findings of fact, conclusions and ordered the remedies found by Morton D. Friedman, Administrative Law Judge, in Case #29-CA-4370, decided on January 26, 1976 and set forth in detail as Exhibit H of the "Appendix and Index of Prior Proceedings", finding the Respondent below, Kimi Sales, Ltd., guilty of violating Sections 8 (a) (3) and (1) of the National Labor Relations Act (29 USCS Section 158).

GROUND ON WHICH JURISDICTION IS INVOKED

2) Petitioner, Kimi Sales, Ltd., petitions for review of the final Order of the National Labor Relations Board decided April 30, 1976 (Exhibit K of the Appendix and Index of Prior Proceedings), by virtue of Title 29 Section 160 (f) of the United States Code, the statutory provision conferring on the United States Court of Appeals jurisdiction to review final orders of the N.L.R.B., on the petition of any "person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought". Cases believed to sustain jurisdiction are: National Labor Relations Board v. Century Broadcasting Corporation 419 F 2d 771 (1969); Amyx Industries, Inc. v. National Labor Relations Board 457 F 2d 904 (1972); National Labor Relations Board v. Ray Smith Transport Co. 193 F 2d 142 (1951); National Labor Relations Board v. Patrick Plaza Dodge, Inc. 522 F 2d 804 (1975); National Labor Relations Board v. Audio Industries, Inc. 313 F 2d 858 (1963); Osceola County Cooperative Creamery Association v. National Labor Relations Board 251 F 2d 61 (1958); National Labor Relations Board v. Ace Comb Company 342 F 2d 841 (1965).

QUESTIONS PRESENTED

1) That the reading of the entire Record as a whole would indicate clearly that there is no substantial evidence to sustain the allegation that the discharge of the person

in question, Mr. James Thomas, was discriminatory. Therefore under Section 8 (a) (3), there being no discriminatory discharge, there was no unfair labor practice and the circumstances did in no way justify the Referees decision in invoking a violation of Section 8 (a) (3)and in turn, # 8 (a) (1).

2) That there was no justification for the administrative Judge to arbitrarily discredit the witnesses of the Petitioner herein. That in so discrediting the witnesses the hearing judge did draw unjustifiably a double inference wherein he drew the conclusion that there was knowledge of Union activity by the Petitioner herein at the time that the decision was made to discharge the employee in question.

3) That the so-called Small Plant Theory as applied by the hearing judge herein was in fact not applicable in that there was no supporting evidence whatsoever that purported Union activities were carried on in such a manner or at times that in the normal course of business the employer would be aware of same beforethe decision to discharge an employee. The record indicates that the employee was specifically advised that his discharge was as a result of financial problems, that in fact, several other employees were laid off several days before, and that he only joined the Union or signed a Union card after other employees had already been discharged. The direct testimony of the employee indicated that his conversations regarding Union activity were in fact had outside the presence of any representatives of the

employer. There is no evidence whatsoever outside of the direct testimony of the employee to substantiate in any way that the discharge was connected to purported Union activities.

4) It is the burden upon the National Labor Relations Board, under all of the circumstances of the case, to prove that the employee was discharged because of alleged Union activities and not because of the financial difficulties as accepted by the hearing judge. The hearing judge did lend credence to the established financial problems of the Petitioner in his decision and there is no substantial evidence of any nature or kind whatsoever other than the singular statement of the former employee to in any way sustain the finding that the discharge had to do with purported Union activity.

STATEMENT OF THE CASE

The employee in question, one James Thomas was initially employed about June of 1974 as outlined on page 13 of Exhibit L of the Appendix, this being the Minutes of the hearing held in Brooklyn, New York before the Hon. Morton D. Friedman. On page 14 of said Minutes it indicates that he left in January of 1975 and was re-hired in March of 1975. On page 16 of said Minutes it indicates that he was an employee from March of 1975 to and including May 21, 1975. He further indicates on page 17 of said Minutes that his normal payroll week would run through Wednesday, the day on which he

was actually laid off.

On page 19 of the Minutes the said Mr. Thomas refers to fact that when he claims to have had discussions regarding Union activity that no one else was present.

Mr. Thomas who initiated the Complaint herein continually attempted during the examination before the hearing judge to refer to conversations had with various other people concerning the possibility of Union activity and counsel for the Petitioner herein was granted a continuing exception regarding the conversations which were apparently without the knowledge or participation of the Petitioner herein, with Judge Freidman granting a continuing exception to same. Again, on page 30 of the Minutes Mr. Thomas refers to conversations had with other people and again indicates that none of the employers were present. Pursuant to Agreement between counsel the entire record of the Minutes of the hearing are shown as Exhibit L under the Appendix and it clearly shows throughout the testimony of Mr. Thomas that he does not claim any specific knowledge of the employer until allegedly the date that he was discharged.

As will be evident from an examination of the Record at the hearing the employer established that there was severe financial difficulties and that two employees had been discharged the Friday prior to May 21, 1975, a Wednesday. At the bottom of page 38 Mr. Thomas indicated that he had asked to leave early on that particular day having indicated

earlier that he was doing clean-up work that dated from the previous Friday when two of the other employees were discharged. Continuing on to page 39 Mr. Thomas indicated that he wanted to leave early and it was at that time that he was let go from his employment. On page 41 of the Minutes Mr. Thomas indicates that he was advised that he was being laid off for economic conditions and then left the premises for good. Under cross-examination on Page 44 the said Mr. Thomas indicated that at various times during the employment he had gone to training school and on page 45 indicates that two other mechanics had been released prior to his being released from employment, being roughly five days before he was discharged. On page 45 he further admitted that Mr. Rudy Pabon was discharged shortly after he, Mr. Thomas, was discharged. The said Mr. Pabon being the Service Writer.

On page 47 Mr. Thomas admitted that his first discussion of so called Union activity with management took place on the 21st day of May, 1975, the same day that he was discharged, following two previous employees that were laid off several days before. On page 49 of the same Minutes Mr. Thomas admitted that the parts men were employees and not part of the management. On page 53 the said Mr. Thomas indicated that the employees that were laid off previously to him by several days, Hector Jimenez and Paul Cisto, were not replaced. Further, on page 54 he admits that the service writer Mr. Pabon was laid off on May 28, 1975. Mr. Thomas

further admits on page 54 that when he was discharged he had indicated to his employer that he wanted to leave early on that particular day to mail fish to Florida, and at this time he was discharged. Again, on page 56 Mr. Thomas admitted that he was told that he was being laid off for economic reasons. On page 57 he admits that he was finishing up the work that Mr. Cisto who had been previously discharged, had not finished on the previous Friday and that this was the last job that he was given, and that he finished same around 12 noon.

The testimony of Thomas Kiely commencing on page 60 details the hiring practice subsequent to the discharge of Mr. Thomas and clearly indicates that there were no additional Class'A' mechanics hired. In his testimony on page 63 of the Minutes he indicates that they were still trying to hold down the costs because there was a profit structure that was in default. He further indicated on page 64 of the Minutes that one of the mechanics, a Mr. Anderson, was up graded to fill in and do the work required of a class 'A' mechanic. On page 66 Mr. Kiely indicated that he had hired two 'C' mechanics, a 'B' mechanic and a mechanic's helper. He again details on page 67 and 68 various other employees who left or were hired during the period subsequent to the departure of Mr. Thomas.

The unrefuted testimony of a Certified Public Accountant, a Mr. Shea, who testified on behalf of the Petit-

ioner, as outlined through pages 76 and 77 of the Minutes, indicated a net loss for the four months from January 1, 1975 to April 30, 1975 in the sum of $5,489 dollars. On page 77 he specifically indicated that the Service Department sustained a loss during such period of $28,972 dollars. Mr. Shea further indicated on page 79 of the Minutes that he advised a curtailment of the service operations and particularly referred to warranty work, this taking place by his testimony on May 12, 1975. He further indicated that a formal letter was submitted expressing his opinions. On page 81 Mr. Shea formally identified exhibit 1 of the Petitioner herein. (Respondent for the Board), the letter detailing the financial problems.

Under cross examination on page 86 Mr. Shea indicated that he advised that the Petitioner would have to lay off people, because that is the largest element of expense. He further indicated on page 87 that the loss in the Service Dept. was approximately $45,000 dollars for the year 1974. On page 90 Mr. Shea again reitterated that the conversation regarding the Service Dept. loss took place on May 12, 1975 which was clearly prior to the dismissal of Mr. Thomas.

On page 95 of the Minutes the witness James Kiely reitterated the fact that a meeting had been held at which time it was agreed that they were going to lay off employees because of the financial problem. He also reitterated on page 96 that two other employees had been let go

before Mr. Thomas was released. On page 97 he indicates that Mr. Thomas was let go when he finished up the work that had been left from that particular section. His testimony further indicates on page 98 that he had planned to let Mr. Thomas go at the end of the day but that same was accelerated due to the fact that Mr. Thomas requested to leave the employment earlier, at mid day, and goes on to testify on page 99 regarding Mr. Ruby Pabon and the fact that he was released shortly thereafter, despite the fact that he was a personal friend.

On page 101 Mr. James Kiely indicated that he advised Mr. Thomas that he was being let go as an economy move, further indicates on page 102 that four men had already been chosen to be released prior to May 16, 1975. Mr. James Kiely indicated on page 104 that it was five or six days prior to May 16, 1975 that the decision had been made to release four men. At the bottom of page 113 of the Minutes Mr. James Kiely indicates that Mr. Thomas was kept on after the 16th day of May to finish out the jobs that they were working on in the shop. He further indicates on page 115 that he had no knowledge of any question of a Union. On page 118 again, he reitterated that he stated to Mr. Thomas that it was just an economy move so far as the reason for his being laid off.

Mr. Thomas Kiely on page 125 again attested to the meeting held with Mr. Shea prior to the release of Mr. Thomas and the other employees. He further attests on page

126 that there was then a meeting with his brothers, after the initial conversation with Mr. Shea. On page 127 of the Minutes he indicates that on the following night there was a final meeting wherein it was decided that a Service Writer and class 'A', 'B' and 'C' mechanics would be released.

On page 131 Mr. Thomas Kiely indicates that he has been in the automobile business for 25 years and that there were various discussions and remarks by employees over the years concerning Union activity, and further attests that he never fired anyone for that reason. On page 132 he again attests to the conversations with the Certified Public Accountant prior to such time as anyone was laid off. He again attests on page 133 that Rudy Pabon was who laid off subsequently to Mr. Thomas is apparently very friendly with his brothers. Starting at the bottom of page 137 Mr. Thomas Kiely detailed the reason why warranty service occasioned a loss in the Service Dept. and again occasioned the necessity of letting go of employees. Again, on the bottom of page 147 of the Minutes, Mr. Thomas Kiely reitterated the fact that the only way he could see trying to obviate the loss in the Service Dept. was to lay off employees. Continuing on to page 148 he indicates that basically the decision to reduce the work force was made by him. On page 150 Mr. Thomas Kiely testifies to the fact that it would be best to reduce the work force across the board, to get rid of one from each category. On page 155 Mr. Thomas Kiely testified that the only mechanic

hired was a class 'B' mechanic on August 20, 1975, although other people did leave, and on page 156 indicated that said mechanic was terminated on September 20, 1975. On page 156 he further testifies to the fact that no other class 'A' mechanic was hired, and then explained that a Mr. Anderson was doing additional work as a class 'A' mechanic subsequently. Mr. James Kiely was recalled as a witness as set forth on page 161 of the Minutes, after Petitioner's counsel had already raised proper objection, but then voluntarily placed him upon the Stand. Mr. James Kiely, on page 161 indicated that he chose Mr. Thomas as the class 'A' mechanic to be let go because Mr. Thomas had indicated that he wasn't sure as to what he was going to do. He indicated further on page 162 that Mr. Thomas had left on an earlier occasion because he was going to go out west and get in to business, possibly with his son. Mr. James Kiely further indicated that Mr. Thomas had a few problems at home and that these were amongst the reasons that he was chosen to be let go. The Record, on page 162 and 163 would further indicate that Mr. Thomas had only come back as of March 24, 1975, a short time prior to his dismissal.

On cross examination of Mr. James Thomas, the Complainant, on page 168, he admitted the fact that though he had left the employment before he was again rehired in March of 1975 when he returned. He further admitted that when he was hired for the first time there was no agreement that it

was a permanent job, or that he had to stay there, or couldn't leave. On page 169 he further admitted that when he came back there was no discussion that the job was to be either permanent or temporary, and Mr. Thomas answered that he just hired me. He further admitted on page 169 of the Minutes that the job of Mr. Anderson was a very difficult and technical job, Mr. Anderson being one who assumed part of the duties of a class 'A' mechanic.

On redirect examination of Mr. James Kiely, on page 171 he indicated that Mr. Anderson did warranty work as well as electrical work, does carburetors and seals double carburetors and was a qualified man, and further indicates on page 172 that he is still doing duty as a class 'A' mechanic as of the time of the hearing.

As part of the Minutes we have not gone to the summation of either counsel but respectfully ask that they be referred to in determining the position of the respective parties. As per exhibit H of the Appendix Judge Freidman decided against the Petitioner herein, and subsequently there to the Petitioner herein took exception to the administrative law judge's decision, as set forth in exhibit J.

Exhibit K shows the decision of the National Labor Relations Board affirming the decision of Judge Freidman without basically further comment. We respectfully take exception to both the decision of Judge Freidman, as well as the National Labor Relations Board and raise the issues as

hereinbefore and hereinafter set forth in objection to such findings.

POINT ONE

Considering the Record as a whole there is no substantial evidence whatsoever to sustain the fact that the discharge of said employee was discriminatory.

In discussing this contention we first refer to the matter of the National Labor Relations Board v. Ray Smith Transport Co. 193 F 2d 142 (1951). We respectfully refer to page 143 of said decision wherein it was urged that "the partiality and bias of the examiner has vitiated the hearing, it urges upon us that a judgment based on his findings and conclusions may not stand, the order of the Board must be vacated, and the matter remanded to it so that Respondent may be accorded the fair and impartial trial guaranteed to it by law".

We quote further from said decision on page 143 as follows, "Of its second position, that the record discloses a hearing conducted with such partiality and unfairness as to amount to a denial of due process, we agree with Respondent that it does present 'the usual picture of supporting findings arrived at by a process of quite uniformly 'crediting' testimony favorable to the charges and as uniformly 'discrediting' testimony opposed."

In referring to page 145 of said opinion, the Circuit Court of Appeals for the Fifth Circuit set forth,

"We know of no principal on which such a ruling could rest, except the principle of suspicion and conjecture and the willingness to believe the worst of one against whom a charge has been made." It is further stated on page 145, "The Board, while conceding that there was no testimony in corroboration of Bain that he had talked to Hillin, none that what he had said to Hillin had been communicated to Respondent, took the view that, because, after the conversation which Bain claimed to have had with Hillin, ... and that Atwell and Smith on the basis of such information, instructed Copeland to discharge these employees." We respectfully submit that the herein case is substantially similar in that we have the one man allegation of Union activity which is not upheld by any further testimony, nor the surrounding facts as heretofore recited. The uncontroverted testimony establishes the fact that the firm was in severe financial straits and that the decision to discharge employees had been made prior to any possible knowledge of the purported Union activity of Mr. Thomas. The very fact that two other employees had already been discharged approximately five days prior to his discharge indicates that the actions of the Petitioner herein were occasioned by such financial difficulties and were not even remotely connected with any purported Union activity. Their position was further sustained by the fact that Mr. Rudy Pabon, though a friend, was also laid off shortly after Mr. Thomas. It is, therefore, respectfully submitted that the

findings of the hearing judge and as affirmed by the National Labor Relations Board are contrary both to the facts and to the law and are arbitrary and capricious in all respects.

We now respectfully refer to the matter of the National Labor Relations Board v. Patrick Plaza Barge, 522 F 2d 804 (1975) by the United States Circuit Court of Appeals.

There, in like circumstances, the Court at page 806 indicated as follows, "At the time in question, January, 1973, it had been in business some four years, heavily financed by Chrysler, and had twenty-two employees in its Service Dept. The administrative law judge, all whose findings were adapted by the Board, warrantadly found that during most of its existence (Respondent) has been undercapitalized, inefficiently managed, and in a very poor, if not crucial, financial condition. At least so far as the Service Dept. was concerned the situation became particularly accute during the last two months of 1972."

Again, this situation is very similar to the case on hand. The Court in this same matter, at page 807 stated as follows, "the judges thinking was circular, forced, he conceded that there is no evidence that respondent knew of the Union activity, and that the course of its financial problems was reason to make discharges. He then concluded that the coincidence of the date was circumstantial evidence that respondent knew of the activity."

The Court further stated, again on page 807,

"The best that can be said for such an analysis is that it fails to recognize the burden of proof. In the first place, the burden is on the Board to show that the employer had knowledge of the Union activity."

We again respectfully submit that the circumstances herein indicate that the employer was acting in good faith and that the decision herein was precipitated by the unrefuted broad financial circumstances.

The Court further in said Patrick Plaza case indicated at page 808, "On this Record we have no hesitency in holding that general counsel failed to meet his burden of proving the discharges were improperly motivated."

As indicated heretofore, there is no additional testimony, nor any additional credible evidence other than the vague ascertion by Mr. James Thomas, as to any discharge which was in any manner related to Union activity. We, therefore, feel that the decision of the administrative judge and the Board should be nullified and set aside.

In the matter of Amyx Industries, Inc. v. National Labor Relations Board 457 F 2d 904 (1972) by the Circuit Court of Appeals for the Eighth Circuit, the Court stated as follows, at page 906, "At the outset we note that mere coincidence in time between the employees Union activities and his discharge does not raise an inference of knowledge on the part of the employer without some direct or persuasive circumstancial evidence of knowledge." We respectfully sub-

mit that there is no such evidence before the Court to establish any connection to purported Union activity.

In keeping with this same reasoning in the said Amyx case the Court, at page 907 stated as follows, "The examiner made much of the fact that one of the employees who knew of (the discharged employees) Union activities later turned out to be pro-management in the labor dispute. Such a circumstance, absent some evidence that the employee communicated his knowledge about his fellow employee to the company, is insufficient to raise an inference of knowledge upon the part of the company." We again respectfully submit that the circumstances herein are most similar and warrant the vacating of the Board's order.

Another case in point, concerning this same question, is the National Labor Relations Board v. Audio Industries, Inc., in the Seventh Circuit and decided January 17, 1963, cited as 313 F 2d 858. The Court at page 861 stated as follows: "The Board may not substitute its judgment for that of the employer as to the selection and discharge of employees. The act proscribes the right of the exercise to hire and fire anyone that is employed as a discriminatory device."

We again quote from the same Audio Industry case at page 864: "Applying the standards laid down by the Supreme Court in Universal Camera Corp v. N.L.R.B., 340 U. S. 474, we must reject the trial examiners findings with regard to the

five employees as being unsupported by substantial evidence inthe record as a whole. Therefore, the Petition of the Board for enforcement of its order is denied."

Again, we reitterate that on this particular point the matter now before the Court would again be most likened to such situation and warrant the vacating of the Boards order.

POINT TWO

That there is no justification for the administrative judge to arbitrarily discredit the witness of the Petitinner herein. That in so discrediting the witness the hearing judge did draw unjustifiably a double inference wherein he drew the conclusion that there was knowledge of Union activity by the Petitioner herein at the time that the decision was made to discharge the employee in question.

On this Point with respect we again refer to the National Labor Relations Board v. Ray Smith Transport Co., 193 F 2d 142 (1951) wherein at page 144 the Court stated as follows: "When it comes, however, to Respondent's third point, that the findings of the examiner are without reasonable support in the evidence, the matter of the examiner's attitude stands differently. In connection with our determination of whether, as claimed by the Board, the findings are fairly supported by legal evidence, or, as claimed by the Respondent, are without sound legal foundation, we must, to the extent that the record supports them, give due weight to

the claims of the respondent. These are: that the findings were not the result of correct reasoning applied to legal evidence, but of the wish being father to the thought; that they were influenced by, indeed were the result of, the examiner's assuming the role of advocate, rather than of judge; that in support of the charges, inference is based on inference, presumption piled on presumption; and that, beginning with inadmissible heresay, and proceeding on suspicion and conjecture, they represent a made or synthetic case."

Again, we reitterate, respectfully, that the situation in the instant case before the Court again fits within the statement of the Court in the Smith matter as quoted above, and on this point alone we respectfully suggest that the finding of the Board be vacated and reversed.

POINT THREE

The Small Plant Theory as applied by the hearing judge herein was in fact not applicable in that there was no supporting evidence whatsoever that purported Union activities were carried on in such a manner or its times that in the normal course of business the employer would be aware of same before the decision to discharge an employee.

Under exhibit H of the Appendix at the top of page 8 of the administrative judge's decision there is reference made, obviously, to the Small Plant Theory. We respectfully submit that under the circumstances herein such Theory

should not be applied in the instant case.

To refute this reference to such Small Plant Theory we respectfully refer to N. L. R. B. v. Ace Comb Co., 342 F 2d 841 wherein the Court in refuting such theory stated as follows: "While there is authority to the effect that in a Small Plant in a small town, knowledge on the employer's part of the organizational activities of the employee can be inferred, as pointed out in the Falls City case, supra, this inference cannot stand without some direct evidence to support it, and this idea is not restricted to the Falls City case alone. Indiana Metal Products Corp. v. N. L. R. B. 202 F 2d 613 (7 Cir. 1953). It is, of course, impossible for a discharge to be discriminatory without knowledge on the part of the employer of the employee's Union activities."

We, again, respectfully submit that on this particular point the case at hand would appear to fit within the reasoning of the Court as above set forth, and again, on this point alone the decision of the Board should be nullified and reversed.

POINT FOUR

It is the burden upon the National Labor Relations Board, under all of the circumstances of the case, to prove that the employee was discharged because of alleged Union activities and not because of the financial difficulties.

In the instant case we have a situation where two employees were laid off previously to the said Mr. Thomas

and an additional employee was laid off shortly thereafter, none of whom joined in making any complaint whatsoever concerning discriminatory discharge because of Union activities. We respectfully submit that it is the burden of the Board to establish that such Union activity was the actual cause for and brought about the discriminatory discharge. We again quote the National Labor Relations Board v. Ace Comb Co., again at page 848 regarding this type of circumstance: "In other words, here the evidence abounds that there was a justifiable cause for Woodliff's discharge. Assigning an illegal cause therefor is only possible by drawing an inference from certain vague statements on the part of management officials while ignoring positive evidence arrayed against such inferences. "Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding." N. L. R. B. v. Citizen-News Co., 134 F 2d 970, 974 (9 Cir. 1943). This being so, we cannot conscientiously hold that the record as a whole contains substantial evidence that the discharge of Woodliff was motivated by other than lawful business reasons. Cf. Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456, (1951)."

In this same respect we again quote from the N. L. R. B. v. Patrick Plaza Dodge 522 F2d 804 wherein at page 807 the Court stated as follows: "The best that can be said for such an analysis is that it fails to recognize the

burden of proof. In the first place, the burden is on the Board to show that the employer had knowledge the Union activity, N. L. R. B. v. Shen-Valley Meat Packers, Inc., 4 Cir. 1954, 211 F 2d 289; N.L.R.B. v. Gotham Industries, Inc., 1 Cir., 1969, 406 F 2d 1306, 1310. This, or any other burden, cannot be satisfied by "suspicion or surmise." Shen-Valley, ante, at 292. When knowledge has been shown, or warrantably inferred, and even when there is evidence of anti-union animus, the Board must still affirmatively show that the discharges were improperly motivated."

On this point alone wherein we allege that the Board has failed to sustain its burden to prove knowledge upon the employer, we again respectfully submit that the order of the Board and the administrative judge should be vacated and nullified.

WHEREFORE, it is respectfully requested that upon the aforementioned points of law the decision of the administrative judge and of the National Labor Relations Board be set aside, nullified and reversed in all respects.

Respectfully submitted,

FRANK R. McGLYNN, ESQ.,
Attorney for the Petitioner

STATE OF NEW YORK)
ss:
COUNTY OF QUEENS)

ANNE REILLY being duly sworn, deposes and says:

That deponent is over the age of 18 years and is not a party to the action, and resides at Woodside, New York

That on the 20 day of October 1976, the deponent served a copy of the within Petitioners Appendix and Index of Prior Proceedings and Brief upon W. CHRISTIAN SCHUMAN, Esq., National Labor Relations Board, /and Robert Sewell, Esq. Washington, D.C. 20570 attorneys for N.L.R.B. in the within action, at the address designated by said attorney by enclosing same in a postpaid properly addressed wrapper, and depositing same in a post office box which is an official depository under the care and exclusive custody of and regularly maintained by the United States Post Office at 61st Street & Roosevelt Avenue, Woodside, New York

Anne Reilly
ANNE REILLY

Sworn to before me this
20th day of October 1976

FRANK R. MacGUINN
NOTARY PUBLIC, State of New York
No. 41-4617700
Qualified in Queens County
Commission Expires March 30, 1977

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS)

Gladys McGlynn, being duly sworn, says that he is over the age of years, that on the 20th day of October, 1976, at 3pm o'clock in the noon, he served the Appendix and Index of Prior Proceedings with Petitioner's Brief on Samuel Kaynard, Esq., Director Region 29, N.L.R.B., 16 Court Street, 4th Floor, Brooklyn, N. Y. 11241. Attn: Harold Weinrich, Esq., attorney for the N.L.R.B. by delivering to and leaving with Harold Weinrich personally, a true copy thereof, and that such service was made at # 16 Court St., Brooklyn, NY.

Gladys McGlynn

Sworn to before me this
20th day of October, 1976

Frank S. McGlynn

FRANK S. McGLYNN
NOTARY PUBLIC, State of New York
No. 2 [illegible] Qual. in Queens Co.
Commission Expires March 30, 1977